

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment and, if so, whether the claimant provided timely notice of the accident.

Conversely, claimant requests the Board to affirm the ALJ's Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Joseph Amayo was employed as a laborer for respondent. His job duties included installing fence, carrying and picking up materials, and driving vehicles. Amayo testified he was carrying an 80-pound concrete bag up a wet, muddy hill and injured his lower back on September 4, 2008. He testified that he reported the injury the following day to respondent's co-owner, Raymond Reynolds.

Q. Tell the judge what the conversation consisted of.

A. I told him I hurt my back. I asked him about workman's comp, and he said no, he wasn't going to do it.

Q. Did he offer to send you to a doctor?

A. No.

Q. Did you go to your own doctor the next day, on September 6th, 2008?

A. Yes.<sup>1</sup>

Nathan McDonagh, a co-worker, was working with Amayo on September 4, 2008, and corroborated his testimony that they were carrying concrete bags as well as fence posts. McDonagh testified that as they worked Amayo told him he had pulled his back and McDonagh had to perform the heavy lifting the remainder of that day. McDonagh was with Amayo the following day when, as they were loading the truck, Amayo told Reynolds that he had hurt his back. McDonagh testified:

Q. Can you describe the conversation to the judge?

A. Joey said, "Look, I hurt my back. I think I need to go get it looked at." He asked, "Do you have workman's compensation," and Mr. Reynolds said, "No, we don't do that."<sup>2</sup>

Amayo then sought treatment with his own physician, Dr. Philip Stevens on September 6, 2008. The doctor's notes of that visit contain a history that Amayo had back

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<sup>1</sup> P.H. Trans. (Feb. 17, 2009) at 7.

<sup>2</sup> P.H. Trans. (Feb. 17, 2009) at 27.

pain for the past two days after carrying 80-pound bags of concrete mix. The doctor prescribed some medication.

Amayo continued to work for several weeks with the assistance of McDonagh. Amayo agreed that he was required to sign a form each week when he received his paycheck. The form stated that he had not been hurt on the job. He signed the form even though he had been hurt and explained:

Q. And you don't dispute that you filled out the section of it that says, "I was not injured in any way while on the job during the above mentioned period."

A. No.

Q. Why did you fill that form out if you, in fact, were injured?

A. Like I said before, I did not receive any workman's comp. I've got child support. I've got bills to pay, people to feed. You've got to work, so you do what you've got to do.<sup>3</sup>

On September 25, 2008, Amayo returned to see his physician due to increased back pain and needing his prescriptions refilled. Amayo sent Reynolds a text message that he had hurt his back. The next day he provided Reynolds with his restrictions. He was provided work within the limitations. Amayo's employment was terminated on September 29, 2008.

Reynolds denied that Amayo told him on September 5, 2008, that he had been injured at work the day before. Reynolds stated that the work Amayo was performing on September 4, 2008, did not require Amayo to carry cement bags and he was at a location different than where he said he had been injured carrying the cement bags.

After receiving the text message on September 25, 2008, Reynolds testified that when he and his wife, respondent's other co-owner<sup>4</sup>, saw Amayo the following day and Amayo denied that he had hurt his back on the job. Reynolds testified that as Amayo continued working he had routinely signed the form, before he got his weekly paycheck, that he had not been injured that week. Finally, Reynolds testified that he did not know Amayo was claiming a work-related injury until he received a voice message from Amayo on September 30, 2008.

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<sup>3</sup> P.H. Trans. (Feb. 17, 2009) at 20.

<sup>4</sup> At Lisa Reynolds' deposition when she was asked if she was respondent's co-owner, she testified she was respondent's owner.

Lisa Reynolds, respondent's owner, corroborated the testimony of her husband that after receipt of Amayo's text message on September 25, 2008, she was present the next day when Amayo was questioned about his back condition and he denied he had suffered a work injury. And she was not aware Amayo was claiming a work injury until September 30, 2008. She further testified that the business records indicated Amayo was working at a different job site than where he said he had been injured.

Amayo testified that although the business records indicated that he was working at a different job site, nonetheless, they would frequently change from one job to another and he could have been at both on the same day.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>5</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>6</sup>

Amayo testified that he injured his back carrying concrete bags while at work and informed respondent the next day. A co-worker corroborated his testimony regarding both the accidental injury as well as his testimony that he provided respondent notice the following day. More significantly, the contemporaneous medical record also corroborates Amayo's testimony that he hurt his back carrying concrete bags. This Board member finds Amayo has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment on September 4, 2008, and provided respondent timely notice of that accident. The ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>8</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated April 1, 2009, is affirmed.

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<sup>5</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>6</sup> K.S.A. 2008 Supp. 44-508(g).

<sup>7</sup> K.S.A. 44-534a.

<sup>8</sup> K.S.A. 2008 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2009.

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DAVID A. SHUFELT  
BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant  
Roy T. Artman, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge